IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-12250
Non-Argument Calendar

D.C. Docket No. 02-21079-CV-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONE PIECE OF REALTY LOCATED AT
5800 S.W. 74TH AVENUE, MIAMI,
FLORIDA, more particularly described as
Lot3, Block 3,of Camner Estates
according to the Plat Book 58 at Page
21 of the public records of Dade
County, Florida together with all
appurtences thereto and all
Improvements thereon,

Defendant,

STEVEN HABAN,

Claimant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(May 25, 2005)

Before BARKETT, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

Steven Haban, the owner of the property in question, appeals the district court's grant of summary judgment in favor of the government in an in rem civil forfeiture action, 21 U.S.C. § 881 (a)(7). The Government alleged in its complaint that the property had been used to commit or facilitate the commission fo a violation of the Controlled Substances Act. Police officers investigating a marijuan[a]-growing operation conducted a warrantless search of Haban's residence and located 84 marijuana plants, 767 grams of marijuana, and $45,000 in cash.

On appeal, Haban first argues that the district court clearly erred in finding that he voluntarily consented to the search of his house and seeks suppression of the marijuana evidence found therein. "A district court's ruling on a motion to suppress presents a mixed question of law and fact." United States v. Zapata, 180 F.3d 1237, 11240 (11th Cir. 1999). We accept the district court's factual findings as true unless the findings are shown to be clearly erroneous. Id. "[A]ll facts are construed in the light most favorable to the prevailing party below." United States v. Bervaldi, 226 F.3d 1256, 1262 (11th Cir. 2000). The district court's application of the law to the is reviewed de novo. Id.

"Credibility determinations are typically the province of the fact finder because the fact finder personally observes the testimony an dis thus in a better position than a reviewing court to assess the credibility of witnesses." United States v. Ramirez-Chilel, 289 F.3d 744, 749 (11th Cir. 2002). We have held that a "trial judge's choice of whom to believe is conclusive on the appellate court unless the judge credits

exceedingly improbable testimony." Id. (internal citations and punctuation omitted)(emphasis in original).

In this case, the magistrate found that the testimony of Haban and his girlfriend was not credible, in light of their denials and minimizations of their participation in any illegal activity. Specifically, among other things, the court noted that they claimed that much of the marijuana was for personal use and denied any prior knowledge about the marijuana, but that (1) Haban had admitted to growing 36 pounds of marijuana over 9 months, worth $216,000, and it would have been "virtually impossible" for him to consume that amount of marijuana, (2) the residence smelled of marijuana, and (3) there were marijuana growing apparatuses throughout the house. Conversely, the magistrate judge credited the testimony of the police officers and, based on the totality of the circumstances, ultimately found that Haban had given voluntarily consented to the search and voluntarily waived his Miranda rights. Because the police officer's testimony was not exceedingly improbable, the district court did not err in finding her credible, and, thus, did not err by finding that Haban voluntarily consented to the search of his home.

Haban next argues that the district court erred in denying him a de novo evidentiary hearing on his motions to suppress the physical evidence and his confession. He concedes that the Supreme Court has held that a district court is not required to conduct a de novo evidentiary hearing on a motion to suppress when a magistrate judge has conducted an evidentiary hearing, but he asserts that the instant case is distinguishable. He asserts that the Supreme Court only has considered this question in relation to a confession, whereas, here he seeks to suppress physical evidence. Alternatively, he argues that the Supreme Court should overrule the existing precedent. Finally, Haban contends that the district court

abused its discretion in denying his motions without a hearing because the police officers' testimony was contradictory.

A district court judge may designate a magistrate to conduct suppression hearings, but must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(B). The Supreme Court has held that "the statute calls for a de novo determination, not a de novo hearing." United States v. Raddatz, 447 U.S. 667, 674 100 S.Cr. 2406, 2411, 65 L.Ed.2d 424 (1980). The Court noted that the district court may, in its discretion, opt to conduct a de novo evidentiary hearing. Id. at 676, 100 S.Ct. At 2413. We have recognized that holding, noting that the district court's statutory obligation is satisfied "as long as the judge, rather than the magistrate, exercised 'ultimate adjudicatory power.'" Profitt v. Wainwright, 685 F.2d 1227, 1237 (11th Cir. 1982). Because the Supreme Court has held that a district court is not required to conduct a de novo evidentiary hearing when a party objects to a magistrate's recommendations, the district court did not abuse its discretion by denying Haban a de novo evidentiary hearing.

Finally, Haban filed a motion in the district court for leave to file a supplemental answer to the complaint, asserting that collateral estoppel was an affirmative defense that had not been available at the time when he filed his initial answer. Specifically, he argued that, since the time when he filed his initial answer, the Florida state court had granted his motions to suppress the same evidence in a criminal proceeding stemming from the same activity. Consequently, Haban sought, essentially, to enforce the state court ruling in the federal proceedings. The district court denied the motion, and, on appeal, Haban argues that we have accepted a policy of liberal amendments in regard to supplemental pleading, and thus,

because there was no good reason for denying leave to supplement a pleading, the district court abused its discretion in denying the motion. He asserts that there would have been no prejudice to the government due to the amended pleading, and a supplemental pleading was the appropriate vehicle for asserting the defense of collateral estoppel. Next, he argues that he only needed to show that the claim was potentially meritorious, or not futile, and that a claim that may survive a motion to dismiss is not futile. He states that the district court appeared to find that his claim was futile, but the case to which it cited did not stand for the proposition for which it was offered. Finally, he argues, applying Florida law, all the elements of collateral estoppel are present in the instant case.

> Federal Rules of Civil Procedure
>
> Upon a motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Fed. R. Civ. P. 15(d). The district court's application of Rule 15 is reviewed for an abuse of discretion. Davenport v. United States, 217 F.3d 1341, 1343 n.4 (11th Cir. 2000). We have accepted a policy of liberal amendments and supplements to the pleadings under Rule 15. See Harris v. Garner, 216 F.3d 970, 984 (11th Cir. 2000).

However, there is no error here. Because this Court held, in an earlier appeal in this case, that a state court's ruling on a motion to suppress was not binding on the federal court, the law-of-the-case doctrine barred the district court from reconsidering the issue. Upon careful review of the record on appeal and consolidation of the parties' briefs, we discern no reversible error in any of the claims asserted.

AFFIRMED.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

-vs.-

ONE PIECE OF REAL PROPERTY LOCATED AT 5800 SW 74TH AVENUE, MIAMI, FLORIDA, more particularly described as Lot 3, Block 3 of camner estates according to the Plat Book 58, at page 21 of the public records of Dade County, Florida together with all appurtenances thereto and all improvements thereon, Defendant,

STEPHEN HABAN, Defendant-Appellant

No. 03-11736

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

363 F.3d 1099

March 24, 2004, Filed

WILSON and KRAVITCH, Circuit Judges, and Goldberg*, Judge.

* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

OPINION BY: KRAVITCH

I. BACKGROUND

In June 2001, the Drug Enforcement Agency and Miami-Dade police officers initiated an investigation into possible marijuana cultivation and distribution activities at the house of Stephen Haban, the defendant. Exactly what

happened that day is not clear. According to the government, several officers knocked on Haban's front door. Haban's girlfriend responded and then went to find Haban. A few minutes later, Haban, who had been in the shower,, stepped outside wrapped in only a towel. The lead officer informed Haban that they were investigating a marijuana tip and presented Haben with a "consent-to-search" form and a "Miranda rights" form. Haban initially had reservations about waiving his Miranda rights and began to check the "no" box on the form. When the police explained the rights more thoroughly, Haban indicated his understanding. The officer checked the box indicating a waiver and Haban initialed above each checkmark. Haban also initialed a box stating that he was "willing to answer [any] questions without having a lawyer present," and signed the Miranda form and the consent-to-search form. The police commenced the search of Haban's house, finding eighty-four live marijuana plants, growing equipment, 767 grams of processed marijuana, and $45,000 in cash. During this time, Haban made several incriminating remarks.

According to Haban, he did not voluntarily consent to the search of his residence. Rather, he claims that he only signed the consent-to-search form because th police refused to allow him to speak to a lawyer, although he asked several times. In addition, he claims that the police told him that he would be forced to wait outside until the police obtained a warrant, and once they obtained that warrant they would tear his house apart and arrest his girlfriend.[7]

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[7] Based on the evidence seized during the search, Haban faced criminal charges in a Florida state court. Haban filed a motion to suppress the evidence obtained from the search. The Florida state court apparently believed Haban's account of the events and granted that motion. Federal courts, however, are not bound by the state court's decision. *See Elkins v.*

The United States brought a forfeiture action, claiming that Haban's residence was used to commit, or facilitate the commission of, a drug crime, in violation of *21 U.S.C. § 881 (a)(7)*. On November 1, 2002, Haban filed a motion to suppress the evidence seized during the search, and to suppress the statements he made during the interview with law enforcement agents. The magistrate judge held an evidentiary hearing on January 14 and 16, 2003, and, on November 27, 2002, while the suppression motion was pending but prior to the suppression hearing, the United States filed a motion for summary judgment. Haban never responded to this motion and, on January 31, 2003, the district court granted summary judgment for the United States. At the same time, the district court denied all pending motions, including Haban's suppression motion, as moot.

II. STANDARD OF REVIEW AND RULES OF LAW

We review a district court's grant of summary judgment de novo. *Pennington v. City of Huntsville, 261 F.3d 1262, 1265 (11th Cir. 2001)*. We view the facts and inferences in the light most favorable to the non-moving party. *Id.* Where "th adverse party does not respond, summary judgment, *if appropriate*, shall be entered against the adverse party." *Fed. R. Civ. P. 56(e)* (emphasis added). Thus, summary judgment, even when unopposed, can only be entered when "appropriate."

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P.*

United States, 364 U.S. 206, 2323-24, 4 L 4. Ed. 23 1669, 80 S. Ct. 1437 (1960); United States v. Perchitti, 955 F. 2d 674, 675 (11th Cir. 1992).

56(c) (emphasis added). Thus, the district court cannot base the entry of summary judgment on the mere act that the motion wsa unopposed, but, rather, must consider the merits of the motion. *See Dunlap v. Transamerica Occidental Live Ins. Co., 858 F.2d 629, 632 (11th Cir. 1988)* (per curiam). The district court need not sua sponte review all of the evidentiary materials on file at the time the motion is granted, but must ensure that the motion itself is supported by evidentiary materials. *See id.* At the least, the district court must review all of the evidentiary materials submitted in support of the motion for summary judgment. *Jaroma v. Massey, 873 F.2d 17, 20 (1st Cir. 1989)* (per curiam) ("The district court cannot grant a motion for summary judgment merely for lack of any response by the opposing party, since the district court must review the motion and the supporting papers to determine whether they establish the absence of a genuine issue of material fact."). In addition, so that there can be an effective review of the case on appeal, the district court's order granting summary judgment must "indicate that the merits of the motion were addressed."[8] *Dunlap, 858 F.2d at 632.*

Finally, local rules cannot provide that summary

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[8] The district court's order granting summary judgment, in relevant portion, stated only that: "THE COURT has considered the Motion, the pertinent portions of the record, and is otherwise fully advised of the premises. It appearing that the Defendant has not responded to the motion for Summary Judgment, it is ADJUDGED that the motion is, GRANTED by default." Although the order states that the district court considered the "pertinent portions of the record," from this language, we cannot determine specifically which portions of the record the district court actually considered. Moreover, the fact that the court granted summary judgment "by default" suggests that the district court may not have reviewed all the required portions of the record. We need not decide the case on this basis, however, because our review of the records convinces us that there is a genuine issue of material fact that made summary judgment inappropriate.

judgment by default is appropriate. *Rule 83 of the Federal Rules of Civil Procedure* requires that local rules be consistent with the Federal Rules. If a local rule purports to allow summary judgment to be granted by default, the rule is impermissible.

III. ANALYSIS

A review of the record indicates that there was a was a genuine issue of material fact as to whether the search of Haban's house was legal, which made summary judgment inappropriate. The government represents that the search of Haban's house was a valid consent search, but the deposition of Haban's girlfriend contradicts this proposition, indicating that there is a genuine issue ofmaterial fact as to whether Haban voluntarily consented to the search of his house, and therefore, whether the search was legal.[9] The government's summary judgment motion states: "On June 15, 2001, a consent search was executed at the defendant property . . ." Similarly, the government's "Statement of Undisputed Facts in Support of its Motion for Summary Judgment" reads: "Steven J. Haban answered the door and provided oral and written consent to search the defendant property." The deposition of Beth Yannuci Fhmie, Haban's girlfriend, however, suggests that Haban's consent was involuntary. Her deposition was attached to the government's motion for summary judgment.[10]

Fahmie's deposition statements suggest that the

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[9] The *Fourth Amendment* exclusionary rule applies in civil forfeiture actions. *One 1958 Plymouth Sedon v. Pennsylvania, 380 U.S. 693, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965).* Without the evidence from the search, there is no evidence to support the government's position.

[10] We confine our review of the record in this case to the materials submitted by the United States in support of its summary judgment motion.

circumstances under which Haban consented to the search may have been coercive. Fahmie was present during the events leading up to the search. She stated that, a short while after summoning Haban, someone called her to the front door. As she was walking to the front door, an officer with a gun greeted her and escorted her outside. Once outside, Fahmie heard Haban ask to speak with an attorney several times, but, each time, the officers refused to allow him to do so. According to Fhmie, the police also refused Haban's request to make a telephone call and his request to obtain more clothing.[11] In addition, she alleged that the police told Haban he had to sign the consent-to-search form, and, if he did not do so, he would be forced to wait until they got a warrant, at which time they would "tear his house apart and arrest his girlfriend." Finally, she claimed that when Haban "went to sign the [form]", the police said "no, no, no, not there," and had him resign it. Apparently, Haban began to sign the blank that indicated a refusal to waive his rights and consent to the search. The police, however, allegedly stopped him, and only then did he sign the blank indicating that the was aware of, and waived, his rights. These facts, if true, indicate that the search was not consensual and that its eventual occurrence was, therefore, illegal. Thus, Sahmie's deposition creates a genuine issue of material fact as to what happened on the day of the search, and as to whether the search was legal.[12] Summary judgment

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[11] Haban was still dressed in only a towel.

[12] The government contends that, under the local rules, its Statement of Undisputed Facts was "deemed admitted" by Haban because it was not "controverted by the opposing party's statement." *S.D. Fla. L.R. 7.5(D)*. Such facts are only "deemed admitted . . . to the extent [that they are] supported by specific references to the [record]." Id. The government supports its statements with citations to the record, and, thus, under the local rule, they would appear to be admitted. The district court must, howevere review the record and determine if there is, indeed, no genuine issue of

should not have been granted on such a record.[13]

For the foregoing reasons, we reverse the decision of the district court granting the government's motion for summary judgment. We remand the case for proceedings consistent with this opinion.

REVERSED and REMANDED

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material fact. Because a review of the record indicates a disputed issue of material fact, summary judgment could not be granted. To the extent that Local *Rule 7.5(D)* permits the district court to grant summary judgment without a review of hte record, that rule is inconsistent with *Federal Rule of Civil Procedure 56*, and therefore, void.

We also note that the government's summary judgment motion acknowledged that summary judgment would not be appropriate if the evidence obtained from the search was suppressed. The motion stated: "Should the court *deny* claimant's [suppression] motion, then this Motion for Summary Judgment is ripe of consideration and ruling." (Emphasis add.)

In addition, we recognize that Haban filed objections to the magistrate's recommendation on the suppression issue. Although required to do so, the district court did not make a de novo review of these objections. *28 U.S.C. § 636(b)(1)*

[13] As stated above, supra n.3 , the evidence from the search is necessary to support the government's position. The district court should have ruled on the suppression motion prior to considering the government's summary judgment motion in order to determine what evidence it could consider on summary judgment.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR MIAMI-DADE COUNTY

CRIMINAL DIVISION

CASE NO: F01-18879

THE STATE OF FLORIDA

Plaintiff,

vs.

STEPHEN HABAN,

Defendant.
_____/

Order Granting Defendant's Motion to Suppress Physical Evidence and Motion to Suppress Defendant's Statements

THIS CAUSE came before this Court on December 20, 2002, for an evidentiary hearing on Defendant's Motion to Suppress Physical Evidence and Motion to Suppress Defendant's Statements.

For the purposes of the hearing, the parties stipulated that the house[1] which was searched, was owned and

[1] A single family dwelling located at 5800 S.W. 74th Avenue, Miami-Dade County, Florida.

occupied by the Defendant, Stephen Haban[2] and that the search was conducted without a warrant.

Having considered the testimony of all witnesses, photographs, the *Miranda* rights waiver form, the consent to search form, the argument of counsel and the applicable authority, the court makes the following findings of fact[3]:

FINDINGS OF FACT

1. As a result of a mere tip[4], at approximately 11:50 am, several police officers[5] approached the front door of the Defendant's home.

2. In order to reach the front door, the officers had to enter through a closed wooden gate, which blocks the walkway between the door and the sidewalk.

3. The officers knocked on the front door and the Defendant's friend, Beth Fahmie, who was inside, went to summon the Defendant who was taking a shower.

4. The Defendant, wet and clothed only in a towel around his waist, went to the door and observed the officers on his front porch.

5. The Defendant looked through a small

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[2] Accordingly, the Defendant has standing to contest the legality of the search.

[3] The court specifically finds all testimony which is inconsistent with these findings to not be credible or worth of belief.

[4] There was no testimony suggesting the tip was from a reliable source or that it was corroborated in any way.

[5] There were between six and seven armed officers.

window in the front door and could see Detective Donnelly holding papers in her hand.

6. One of the officers told the Defendant to open the door because they wanted to speak with him.

7. The Defendant complied with the instruction to open the door by unlocking it and opening the door approximately eight inches.

8. The police claim that when the Defendant opened the door they could smell the odor of marijuana. As will be explained later, this testimony is not credible and is rejected.

9. The officers then told the Defendant that they had information that marijuana was being grown in the home and that they wanted him to come outside, onto the front porch (dripping wet and virtually naked - dressed only in a towel) so they could talk to him.

10. The Defendant again complied with the instruction and exited his home and was directed to a table to be interviewed by the only female police officer present, where he was essentially surrounded by the other officers.

11. This court specifically finds the Defendant to be educated, intelligent and eloquent.

12. The Defendant was then presented with both the *Miranda* rights waiver form and the consent to search form. His attention was directed first to the *Miranda* form.

13. The *Miranda* form presented to the Defendant contains each right separately set forth. After each, there si a "yes" with a blank space to indicate a lack of understanding of that right. The Defendant was supposed to place his initials on either the yes or no blank space according to whether he understood that right or not.

14. With respect to the first right on that form

(*i.e.* the right to remain silent) the Defendant tried to place his initials in the "no" space but was interrupted and prevented by the police from doing so. The form contains the Defendant's partial initials in the "no" space.

15. The Defendant's claim that he tried to initial the "no" with a blank space because he did not wish to waive his rights, is credible and is believed.

16. Thereafter, Detective Donnelly placed a check mark next to each "yes" blank and instructed the Defendant to place his initials next to each mark. The Defendant complied with this instruction.

17. Prior to the Defendant's execution of the consent to search form, the police informed him that they would obtain a warrant if he refused.

18. After the Defendant signed both the *Miranda* form and the consent to search form he "confessed" and told the police where the marijuana plants and other contraband were located.

19. Detective Robbins and a drug sniffing dog then approached and entered the residence. Apparently, the drug sniffing dog has a very limited abilities since it did not "alert" upon approaching the door and thus the dog could not smell the marijuana all the officers claimed they could smell. For this reason the claim by the officers that they could smell the marijuana when the Defendant opened the door is rejected and is not believed.

20. Det. Robbins exited the house and informed the other officers that the dog had alerted at several locations within the home.

21. The police then searched the home and seized growing marijuana plants, money, and other contraband.

CONCLUSION

Assessing the objective circumstances of the situation from the perspective of a reasonable person in the Defendant's position, this court finds that the Defendant's freedom of action was deprived in a significant way and that he was thus in custody at the time of his interrogation. In *Miranda v. Arizona*[6], the Supreme Court held that a Defendant's statement may not be introduced in evidence unless the prosecution shows that the accused voluntarily, knowingly and intelligently waived his right to remain silent as guaranteed under the Fifth Amendment to the Constitution. The State has failed in this showing and this court finds that Defendant actually tried to exercise his right to remain silent, but was prevented from doing so. The court finds that the *Miranda* rights wavier form was not executed voluntarily and that the Defendant's statements were not voluntarily made.

Because a warrantless search is *per se* unreasonable under the Fourth Amendment to the Constitution[7], the State has attempted to show that the search was *sub judice* was conducted pursuant to the Defendant's voluntary consent. It is well-settled that consent is not voluntary if given only in acquiescence to a claim of lawful authority[8]. Therefore, a warrantless search may not be justified on the basis of consent that is given only after the police claim that they have possession of a warrant or that one can be

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[6] 384 U.S. 436 (1984).

[7] *Jorgenson v. State*, 714 So. 2d 423 (Fla. 1998).

[8] *Bumper v. North Carolina*, 391 U.S. 543 (1968).

obtained if necessary[9]. Here, once again, the totality of the circumstances show that the consent to search was not freely and voluntarily given and that it was given, at best, because the Defendant acquiesced to the show of authority after he was escorted out of his house, in daylight, in view of his neighbors while virtually naked and surrounded and questioned by both male and female officers.

It is therefore, ORDERED and ADJUDGED that Defendant's Motion to Suppress Physical Evidence and Motion to Suppress Defendant's statements is hereby GRANTED.

DONE and ORDERED in Miami-Dade County, Florida this 7th day of January, 2003.

Pedro P. Echarte, Jr.
Circuit Court Judge

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[9] See e.g. *U.S. v. Tovar-Rico*, 61 F3d 1529 (11th Cir. 1995).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-12250

D.C. Docket No. 02-21079-CV-KMM
Filed November 16, 2006
Thomas K. Kahn, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONE PIECE OF REALTY LOCATED AT
5800 S.W. 74TH AVENUE, MIAMI,
FLORIDA, more particularly described as
Lot3, Block 3,of Camner Estates
according to the Plat Book 58 at Page
21 of the public records of Dade
County, Florida together with all
appurtences thereto and all
Improvements thereon,

Defendant,

STEVEN HABAN,

Claimant-Appellant.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BARKETT, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Rosemary Barkett
UNITED STATES CIRCUIT JUDGE